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In The

Supreme Court of the United States

October Term, 1994

OSCAR DIAZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER TRIAL COURTS HAVE THE DISCRETION, DESPITE THE DICTATES OF THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT, TO TOTALLY BAR CROSS-EXAMINATION DESIGNED TO ELICIT A WITNESS' BIAS IN A CRIMINAL CASE BY EMPLOYING THE "BALANCING"TEST IN RULE 403 OF THE FEDERAL RULES OF EVIDENCE?

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OPINION BELOW

The July 29, 1994, opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Diaz*, 26 F.3d 1533 (11th Cir. 1994). A copy of the decision in *Diaz* is attached hereto as APPENDIX A.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Diaz* was filed on July 29, 1994. The Eleventh Circuit denied rehearing on October 18, 1994. This petition for a writ of certiorari followed within 90 days of the latter date. *See* Supreme Court Rule, Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Confrontation Clause of the Sixth Amendment provides, in pertinent part: "In all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. Procedural History

On April 19, 1990, the Petitioner, OSCAR DIAZ, and twelve co-defendants were charged in the Southern District of Alabama in a five count narcotics indictment. (R4-1.) Diaz went to trial on September 19, 1990. On October 2, 1990, the district court granted Diaz' motion for a judgment of acquittal on Counts II and III. (R4-45.) On October 5, 1990, Diaz was found not guilty of Counts I and IV and guilty of Count V -- possession with intent to distribute cocaine. On December 10, 1990, Diaz was sentenced to serve 328 months of imprisonment. (R4-61.)

As noted above, on July 29, 1994, the United States Court of Appeals for the Eleventh Circuit affirmed Diaz' conviction.

B. Statement of the Facts

Between March 25, 1990 and April 17, 1990, undercover Customs agents had a series of meetings with cocaine trafficker Billy Allen and other members of his organization. None of these meetings involved Petitioner Diaz. The delivery of the cocaine was ultimately set for April 18, 1990, at a barn in Baldwin County, Alabama.

The government's evidence of Diaz' involvement in the delivery stemmed primarily from three witnesses. Agent James Tanner testified that he and Agent Kyle Barnette drove to a truck stop to meet co-defendant Schwartz. Schwartz was to supply two trucks and a mini-van in which to pickup the cocaine for transfer to Miami. (R18-1018-19.)

Schwartz introduced Agent Tanner to co-defendant Deatherage, who was standing with 6 to 7 individuals Schwartz identified as his drivers. (R18-1022.) The trucks and van were driven to the barn and backed inside. Thereafter, the undercover agents started unloading duffle bags of cocaine from an undercover truck already inside of the barn. (R18-1024.) Other co-defendants stacked and counted the duffle bags on pads of paper.

After the cocaine was counted, it was placed back into the duffle bags. The bags were zippered closed. The closed duffle bags were then taken by co-defendants Fernandez, Rodriguez and Pastor to Pastor's truck, where Diaz, an assistant to Pastor, placed them in the rear of the truck. (R18-1050-52.) On cross-examination, Agent Tanner admitted that the entire unloading and counting of the cocaine had taken place behind the undercover truck, away from Diaz' view, since Diaz had remained by the passenger side of Pastor's truck. (R18-1054-59.) By the time the duffle bags were carried to Diaz at the passenger side of Pastor's truck, they had been zippered closed.

The government's most critical witness against Diaz was Customs Agent Keith Barnette, Kyle Barnette's younger brother. Keith Barnette was the *only* government witness to offer direct testimony concerning Diaz' knowledge of the contents of the bags he was loading.

Shortly after Diaz' arrest in this case, Agent Keith Barnette was arrested on a State court charge in Alabama for vehicular homicide, committed while on duty as a Customs agent. If convicted, Barnette faced a possible sentence of life imprisonment. During his trial, Diaz sought to cross-examine Barnette concerning this pending case. (R18-1156.) When the prosecutor objected, defense counsel argued that the cross-examination was necessary to show Barnette's potential bias for the government, *i.e.*, to show that he had a motive to curry favor with the government to gain assistance in derailing the state prosecution. (R18-1155-56.)

In determining whether to permit the line of cross-examination, the district court learned from the prosecutor that Barnette had made notes of his conversations with Diaz shortly after Diaz' arrest. (R18-1156.) The court believed that if Agent Barnette's trial testimony was consistent with the notes -- *i.e.*, at a time *before* the vehicular homicide -- then cross-examining him about the homicide would not demonstrate bias and would be excluded on relevancy grounds. (R18-1157.)

On direct examination, Keith Barnette testified that he was present in the barn on April 18 and observed other defendants hand the duffle bags containing the cocaine to Diaz. According to Barnette, he even spoke to Diaz about how Diaz was "concealing" the "cocaine" in the bed of the truck. (R18-1166.) Barnette further testified that Diaz specifically talked to him concerning the "count" on the cocaine, and that he observed Diaz take a calculator from the truck and add some numbers. (R18-1168-69.)[1]

On cross-examination, Barnette admitted that none of the alleged conversations with Diaz had been recorded, although recording devices were utilized at the barn. Moreover, he admitted that his direct testimony concerning Diaz' statements about having "concealed" the "cocaine" were exaggerated. In fact, Diaz merely referred to "putting" a "load" in the bed of the truck. (R18-1177.)

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[1] The alleged calculator was never introduced into evidence by the government.

Agent Barnette was then cross-examined about his most damaging testimony against Diaz -- his allegation that he had *personally* talked to Diaz about the use of a calculator to make a "count" of the cocaine. After establishing that Agent Barnette had written notes shortly after Diaz' arrest, Agent Barnette admitted that *his notes did not mention anything at all about his alleged conversation with Diaz about the count and the calculator:*

Q: Do you see the word calculator in your report?

A: No, sir, I didn't.

Q: Did you see any word that is synonymous with the word calculator in your report?

A: No, Sir.

Q: Do you see any reference under the sun in your report to Mr. Diaz having discussions with anybody about the count of the packages?

A: No sir.

Q: Those things aren't in your report, are they?

A: You keep referring to it as a report. That is rough notes strictly to jog my memory, nothing else.

Q: Sir, whatever you want to call it, those two pieces of testimony are not in this document, are they?

A: No, they are not.

(R18-1183-1185.)

Defense counsel, believing that he had now satisfied the district court's criteria for cross-examining Agent Barnette about the vehicular homicide -- *i.e.*, the *lack* of consistency between the report and his trial testimony -- sought to cross-examine Agent Barnette about the vehicular homicide. Thus, coun-sel asked the agent whether there had "been new developments in your life that might cause you to want to curry favor with the United States Government prosecutors and customs agents and other law enforcement agents in this case." Barnette answered in the negative. The court asked Barnette the same question a second time and Barnette again denied having any reason to "curry favor."[2] When counsel then sought to question the agent about the homicide, the prosecutor immediately objected. (R18-1185.)

At sidebar, defense counsel argued that in light of the obvious inconsistency between the notes and Agent Barnette's trial testimony, cross-examination about the possible bias caused by the homicide charge was now required under the court's own analysis of the issue. (R18-1192-97.) Nonetheless, the court adhered to its prior ruling, barring any mention of the homicide charge. (R18-1197.) The court indicated that Diaz would be allowed to call Agent Barnette as a defense witness if he could

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[2] These statements were false whether or not Agent Barnette's notes were consistent with his trial testimony.

present any additional basis on which to persuade the court to change its mind. (R18-1198.)

On redirect, Agent Barnette claimed that he *orally* had told the United States Attorney's Office about Diaz' statements shortly after Diaz' arrest. The government rested its case with no further testimony concerning Diaz.

Diaz subsequently sought to call Agent Barnette as a defense witness to establish his bias in favor of the government. Defense counsel reiterated his argument that Agent Barnette might be eager to help the government in this case in return for its help with State authorities, particularly as character witnesses at either trial or sentencing. Furthermore, counsel informed the court that Agent Barnette was being sued civilly for causing the homicide. Since he was on duty at the time, he *could* be represented in the civil suit by the United States Attorney's Office. Counsel argued that his need for assistance in the civil suit provided additional motivation for Agent Barnette to slant his testimony in the government's favor. (R20-1567-73, 1588-95.) The court, however, adhered to its previous rulings and barred the testimony. (R20-1570.)[3]

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[3] In his closing argument to the jury, the prosecutor highlighted the statements Diaz supposedly made to Agent Barnette. (R.21-1830, 1837.)

C. The Eleventh Circuit's Decision

On appeal, Diaz argued that the district court's rulings violated his Sixth Amendment right of confrontation. However, in *United States v. Diaz*, 26 F.3d 1533, 1539-40 (11th Cir. 1994), the Eleventh Circuit rejected the challenge. The Eleventh Circuit reasoned that due to the "highly prejudicial nature of the arrest," the district court had the discretion to bar cross-examination into Agent Barnette's potential bias, "as long as Barnette's testimony did not deviate from his notes and prior statements." *Diaz*, 26 F.3d at 1540. The court then ignored the undisputed fact that Agent Barnette had made no mention of Diaz' statements in his notes. The court, in effect, accepted the veracity of Agent Barnette's *trial testimony* on redirect that he had orally informed the government about Diaz' statements shortly after Diaz' arrest but before the vehicular homicide. Having made this credibility decision for the jury, the Eleventh Circuit ruled that Agent Barnette's trial testimony was "entirely consistent with these prior [oral] statements." *Id.*, at 1540. Balancing the alleged lack of probativity against the assumed prejudice to the State's case if testimony concerning the homicide was elicited, the Eleventh Circuit ruled that the district court had acted within its discretion in barring the cross-examination.

REASON FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE PETITION TO END THE CONFUSION AMONG THE FEDERAL COURTS CONCERNING THE RELATIONSHIP BETWEEN THE CONFRONTATION CLAUSE AND RULE 403 OF THE FEDERAL RULES OF EVIDENCE AND HOLD, UNEQUIVOCALLY, THAT EVIDENCE OF A KEY WITNESS' BIAS CANNOT BE EXCLUDED BY A DISCRETIONARY "BALANCING" OF INTERESTS.

The Confrontation Clause of the Sixth Amendment provides, in pertinent part, that "[i]n all criminal proceedings, the accused shall enjoy the right ... to be confronted with the witnesses against him." The rights guaranteed by the Confrontation Clause are secured in two ways: (1) the right to cross-examine the government's witnesses; and (2) the "right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967). However, "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination*.'" *Davis v. Alaska*, 415 U.S. 308, 315-16, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis in original). *Accord Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986).

The Court has viewed cross-examination as not only important to the defendant but to the proper functioning of the criminal justice system as a whole. Cross-examination ensures "the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary

proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845, 110 S.Ct. 3157, 3162 111 L.Ed.2d 666 (1990) (citation omitted). *See also Kentucky v. Stincer*, 482 U.S. 730, 737, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987) (confrontation right designed to promote truth-finding function at trial). Indeed, the Court has characterized cross-examination as the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 157, 90 S. Ct. 1930, 26 L.Ed.2d 489 (1970).

Although the Court has, in dicta, recognized that trial courts maintain a degree of discretion to impose "reasonable limits" on the scope and duration of cross-examination, it has consistently rejected efforts by trial courts to reduce the Confrontation Clause to the type of "balancing" test employed by the Eleventh Circuit in this case or one which would effectively equate the right of confrontation to Rule 403 of the Federal Rule of Evidence.[4]

For example, in *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974), the defendant sought to show the bias of a key witness by cross-examining him with the fact that

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[4] Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

he was on probation from a juvenile offense at the time of the burglary and, therefore, may have had a reason to accuse the defendant – either because he feared his own possible jeopardy or because his probationary status made him "subject to undue pressure from the police." *Davis*, 415 U.S. at 311, 94 S.Ct. at 1108. The prosecution moved for and obtained a protective order to prevent any reference to the witness' juvenile record probationary status based upon an Alaskan statute protecting juvenile criminal records from disclosure.

The Court recognized that Alaska had strong policy interests in the protecting the "anonymity of a juvenile offender," *id.*, 415 U.S. at 319, 94 S.Ct. at 1112, and that the scope of cross-examination is "[s]ubject always to the board discretion of a trial judge to preclude repetitive and unduly harassing interrogation." *Id.*, 415 U.S. at 316, 94 S.Ct. at 1110. However, the Court rejected the State's effort to combine these elements and create a discretionary balancing test for determining the existence of Confrontation Clause violations. "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness." *Id.*, 415 U.S. at 319, 94 S.Ct. at 1112. *See also id.* (since "[s]erious damage" to the State's case by the cross-examination was a "real possibility," the right of confrontation was "paramount to the State's policy of protecting a juvenile offender"); *id.*, 415 U.S. at 316, 94 S.Ct. at 1110 ("[t]he partiality of a witness is subject to exploration at trial,

and is 'always relevant as discrediting the witness and affecting the weight of his testimony'") (quoting 3A J. Wigmore, Evidence § 940, p. 775).

In *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986), the Court also considered and rejected an effort by a trial court to subject the Confrontation Clause to a "balancing" test. Robert Van Arsdall was convicted of murder. One of 16 witnesses against him was one Robert Fleetwood. On cross-examination, defense counsel sought to show Fleetwood's bias by cross-examining him about the dismissal of a criminal charge, being drunk on a highway. Outside the presence of the jury, Fleetwood admitted that the drunkenness charge had been dismissed in exchange of his promise to speak to the prosecutor about the murder, but he denied that the agreement had affected his testimony. Citing Delaware Rule of Evidence 403 -- which the Court acknowledged was "virtually identical" to Federal Rule of Evidence 403 -- the trial court barred the cross-examination. *Van Arsdall*, 475 U.S. at 676 & n. 2, 106 S.Ct. at 1434 & n. 2.

The Delaware Supreme Court held that ruling violated the Confrontation Clause, because it kept from the jury an entire area of potential bias. The court also ruled that such a violation was so fundamental that it was not subject to a harmless error analysis.

This Court rejected the Delaware Supreme Court's view concerning harmless error, holding that Confrontation Clause

violations were subject to the same harmless error standards as most other constitutional violations. However, the Court agreed with the Delaware Supreme Court that the Rule 403 balancing test employed by the trial court violated the Confrontation Clause. As it had in *Davis*, the Court, again in dicta, noted that courts may "impose reasonable limits" on cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, 475 U.S. at 679, 106 S.Ct. at 1435. However, the Court ruled that whatever the scope of such residual discretion, it did not insulate the exclusionary ruling from the Confrontation Clause. A constitutional violation had occurred, because "the trial court prohibited *all* inquiry into the possibility that Fleetwood would be biased as a result of the State's dismissal of his pending public drunkenness charge." *Id.*, 475 U.S. at 679, 106 S.Ct. at 1435 (emphasis in original). The Court then fashioned the following test for determining the existence of a Confrontation Clause violation:

> We think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in an otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness."

Id., 475 U.S. at 680, 106 S.Ct. at 1436.

Two years later, in *Olden v. Kentucky*, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (per curiam), the Court once again rejected a trial court's attempt to use a balancing test to exclude evidence showing a witness' possible bias. James Olden and his friend, Charlie Ray Harris, both of whom were black, were convicted of kidnaping, raping and sodomizing a white woman, Starla Matthews. At the end of the alleged crime, Harris dropped Matthews off, at her request, at the home of Bill Russell. Russell saw her exit Harris' car. Matthews and Russell were both married to and living with other people at the time of the incident but were involved in an extra-marital affair. By the time of trial, they were living together. At trial, Harris contended that Matthews concocted the rape story to protect her relationship with Russell, "who would have grown suspicious upon seeing her disembark from Harris' car." *Olden*, 488 U.S. at 230, 109 S.Ct. at 482. Therefore, he wished to cross-examine Matthews about her current cohabitation with Russell. The trial court, however, excluded the evidence on the grounds by employing a balancing test essentially the same as that permitted by Rule 403 of the Federal Rules of Evidence, *i.e.*,that "'its probative value [was] outweighed by its possibility for prejudice.'" *Id.* *See* p. 11, n. 4 *supra*. The Kentucky Supreme Court agreed and, using a similar balancing test, found that Harris' right of cross-examination "was outweighed by the danger that revealing Matthews' inter-racial relationship would prejudice the jury against her." *Id.*, 488 U.S. at 232, 109 S.Ct. at 483.

This Court again rejected the balancing approach and found that the limitation on the cross-examination constituted a Confrontation Clause violation. While the Court continued to recognize, still in dicta, that "reasonable limits" could be imposed on cross-examination, such limits did not extend to barring a line of cross-examination designed to show a witness' bias. "Speculation as to the effect of jurors' racial biases cannot justify exclusion of cross-examination with such strong potential to demonstrate the falsity of Matthews' testimony." *Id.*, 488 U.S. at 232, 109 S.Ct. at 483.

The only situation in which the Court has adopted a balancing test for determining Confrontation Clause violations is in the context of limitations placed on a "face-to-face" confrontation with witnesses. Thus, in *Maryland v. Craig*, 497 U.S. 836, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), the Court found that a child witness could testify against a defendant at trial, outside of the defendant's physical presence, by one-way closed circuit television. The Court found that such limits could be imposed "only where denial of such confrontation is necessary to further an important public policy *and* only where the reliability of the testimony is otherwise secured." *Craig*, 497 U.S. at 850, 110 S.Ct. 3166. The Court found that the "reliability" of the child's testimony in *Craig* was "secured" because Maryland's statute guaranteed that "the defendant retains full opportunity for contemporaneous cross-examination" and the judge, jury and defendant were fully able to view the witness' demeanor. *Id.*, 497 U.S. at 851, 110 S.Ct. 3166.

In short, despite the Court's repeated assurances that trial courts retain a measure of control over the scope of cross-examination, this Court has consistently upheld the core meaning of the Confrontation Clause. "The partiality of a witness ... is 'always relevant,'" *Davis*, 415 U.S. at 316, 94 S.Ct. at 1110, and cannot be "balanced away" even by a State's interests in protecting juveniles or by a court's predictive judgment that the cross-examination needed to unearth the bias might trigger a jury's latent racial prejudices.

In the instant case, the Eleventh Circuit barred an entire area of cross-examination into a key witness' bias where *no* "public policy" was at stake and where the danger of prejudice to the government was even more speculative than in *Olden*. In doing so, the Eleventh Circuit fundamentally misconstrued the Court's interpretation of the Confrontation Clause. Although defense counsel's cross-examination was designed to explore Agent Barnette's potential bias, the Eleventh Circuit nonetheless believed it possessed the discretion to completely bar the inquiry. *See United States v. Diaz*, 26 F.3d at 1540 ("the mere fact that Appellants sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination"). The Eleventh Circuit then compounded this erroneous view of the Court's Confrontation Clause decisions by engaging in a balancing test to determine whether a violation of the Confrontation Clause had occurred. Although the court did not specifically cite to Rule 403, it used a similar test. Thus, the court weighed the "highly prejudicial

nature" of Agent Barnette's arrest for vehicular homicide against its view of the probative nature of the cross-examination. *Id.*, citing *United States v. Thorn*, 917 F.2d 170 (5th Cir. 1990). In assessing probativity, the Eleventh Circuit took it upon itself to disregard the undisputed fact that Agent Barnette's trial testimony was materially different from his report.

The prejudicial effect of the Eleventh Circuit's exclusionary ruling cannot be overstated. It gutted Diaz' ability to fully and fairly cross-examine Agent Barnette on matters directly related to his credibility. Diaz had the right to demonstrate to the jury that there existed a *reason* why Agent Barnette's contemporaneous notes and his trial testimony differed about what Diaz allegedly said while loading the bags. Moreover, the determination of whether to believe or disbelieve Barnette was solely for the jury to decide. Nothing in this Court's decisions gave the Eleventh Circuit the discretion to accept Barnette's *trial testimony* that he had once, in the past, orally told the government about Diaz and then to weigh Barnette's credibility at trial against the "highly prejudicial nature of the arrest" to bar all cross-examination on an area of bias.

To be sure, the Court does not often grant a petition for a writ of certiorari simply to correct the flawed decision of a single appellate court. However, the Eleventh Circuit's decision in *Diaz* is not unique. A canvas of decisions from other courts reveals a pattern of similar confusion concerning the relationship (if any) between the Confrontation Clause and Rule 403 of

the Federal Rules of Evidence. Numerous courts have construed the dicta from this Court's decisions concerning the residual discretion of trial courts to limit cross-examination as an invitation to equate the Confrontation Clause with Rule 403.

For example, in *Thom* – one of the decisions relied upon by the Eleventh Circuit in *Diaz* -- the Fifth Circuit rejected a Confrontation Clause challenge to a ruling of a district court barring cross-examination of a witness concerning a pending criminal charge. The Fifth Circuit explicitly ruled that Rule 403 gave district courts the "mandate" to exclude such evidence "if its prejudicial effect outweighs its probative value." *See also United States v. Warren*, 18 F.3d 602, 603 (8th Cir. 1994) (district court did not violate Confrontation Clause by exercising its discretion to bar cross-examination about whether witness' cooperation was motivated by desire to regain custody of children); *United States v. Lankford*, 955 F.2d 1545, 1549 (11th Cir. 1992) (Confrontation Clause not violated when court refused to allow cross-examination of witness concerning drug arrests of witness' sons because more prejudicial than probative); *United States v. Young*, 952 F.2d 1252, 1258 (10th Cir. 1991) (Confrontation Clause not violated when defendant barred from cross-examining witness about bias against defendant because questions about witness' potential medical malpractice liability deemed more prejudicial than probative); *United States v. Weiss*, 930 F.2d 185 (2d Cir. 1991) (district court did not abuse its discretion in barring cross-examination of witness concerning witness' animosity toward defendant, citing Rule

403), *cert. denied*, 112 S.Ct. 133 (1992); *United States v. Tarantino*, 846 F.2d 1384, 1407 (D.C. Cir.) (Confrontation Clause not violated when defendant barred from cross-examining witness about benefits witness receiving from witness protection program because testimony would be prejudicial to co-defendant), *cert. denied*, 488 U.S. 840 (1988); *United States v. Bittner*, 728 F.2d 1038, 1042 (8th Cir. 1984) (Confrontation Clause not violated when court limited cross-examination of witness about past sexual incidents with boyfriend because testimony more prejudicial than probative).

Other courts, on virtually the same types of fact patterns, have correctly followed the *holdings* of the Court's decisions in *Davis*, *Van Arsdall* and *Olden*, and have found Confrontation Clause violations. *See, e.g., Wright v. Dallman*, 999 F.2d 174, 179 (6th Cir. 1993) (Confrontation Clause violated when defendant not permitted to cross-examine witness concerning potential interest in testifying for prosecution when witness had not yet been sentenced for a crime to which he had pleaded guilty); *United States v. DeSoto*, 950 F.2d 626, 630 (10th Cir. 1991) (Confrontation Clause violated when defendant not permitted to cross-examine witness about possible bias arising from defendant's dispute with witness' boyfriend whom defendant had accused of embezzlement); *United States v. Williams*, 892 F.2d 296, 301 (3d Cir. 1989) (Confrontation Clause violated when trial court prohibited any inquiry into government witness' prior conviction in an attempt to show bias); *United States v. Roan Eagle*, 867 F.2d 436, 443-44 (9th Cir. 1989) (error to bar cross-

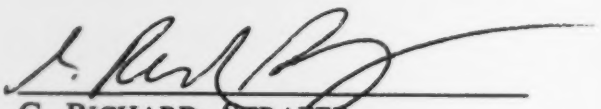
examination of witness concerning plea to lesser charge, rejecting district court's argument that jury would have been unduly prejudiced by testimony about potential sentences), *cert. denied*, 490 U.S. 1028 (1990); *United States v. Lynn*, 856 F.2d 430, 432 (1st Cir. 1988) (complete bar of cross-examination concerning witness' polygraph test violated Confrontation Clause, recognizing that court's discretion to limit cross-examination "'becomes operative only after the constitutionally required threshold level inquiry has been afforded the defendant'") (citation omitted); *Clark v. O'Leary*, 852 F.2d 999, 1005-08 (7th Cir. 1988) (Confrontation Clause violated when defendant not permitted to question key witness regarding prejudice against defendant resulting from witness' membership in rival street gang). *Cf. United States v. Garcia*, 988 F.2d 965, 969 (9th Cir. 1993) (no Confrontation Clause violation where defense counsel allowed to cross-examine witness about government's help in pending State murder investigation).

The Court should use this case as the opportunity to end the confusion reigning in the federal courts and hold that the mandate of the Confrontation Clause is not satisfied merely by employing a Rule 403 "balancing" test. Instead, the Court should reiterate its position in *Davis* that "[t]he partiality of a witness ... is 'always relevant as discrediting the witness and affecting the weight of his testimony'" and hold that trial courts do not have the "discretion" to bar relevant evidence of a witness' bias.

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,



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CERTIFICATEOF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 28th day of December 1994 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Gloria Bedwell, Assistant United States Attorney, United States Attorney's Office, 169 Dauphin Street, Suite 100, Mobile Alabama 36602.

G. RICHARD STRAFER

UNITED STATES of America,
Plaintiff-Appellee,

v.

Oscar DIAZ; Jose Manueal Ruiz; Jesus Manuel Fernandez; Al Pastor; Billy Allen, a/k/a William Holster Allen; Dudson Woods; Daniel Lee Deatherage; Kelly Fred Kalinowski; Irving Schwartz; Ramon Rodriguez, Jr.; Robert Lincoln Fowler; Joseph Thomas Marino and Samuel J. Degiso, Defendants-Appellants.

No. 90-7890

United States Court of Appeals,
Eleventh Circuit.

July 29, 1994.

[*reported at* 26 F.3d 1533 (11th Cir. 1994)]

[West Headnotes Deleted]

[1536]
J.B. Sessions, U.S. Atty., Gloria Bedwell, Mobile, AL, for U.S.

Bill Clay, N.Bay Village, FL, Lawrence E. Besser, Miami, FL, for Ruiz.

John Thorton, Jr., Thorton, Rothman & Emas, Miami, FL, Joel Hirschhorn, Coral Gables, FL, for Ruiz.

Domingo Soto, Mobile, AL, for Fernandez.

Richard R. Williams, Mobile, AL, for Pastor.

APP. A

Leonard Rosenberg, Miami, FL, for Allen.

Gregory S. Reese, Mobile, AL, for Woods.

John Furman, Mobile, AL, for Kalinowksi.

Joaquin Perez, Miami, FL, for Rodriguez.

John R. Howes, Ft. Lauderdale, FL, for Marino

James W. May, Foley, AL, for Degiso.

Robert Levitt, Atlanta, GA, for Swartz.

Alan E. Weinstein, Miami Beach, FL, for Deatherage.

David Garber and Jana V. Jay, Napes, FL, for Fowler.

Appeal from the United States District Court for the Southern District of Alabama.

Before EDMONDSON, Circuit Judge, JOHNSON, Senior Circuit Judge, and PITTMAN, Senior District Judge

JOHNSON, Senior Circuit Judge:

Defendant-appellant Oscar Diaz and twelve co-defendants ("Appellants")[1] appeal various aspects of their

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[1] The other appellants are Jose Manuel Ruiz, Jesus Manuel Fernandez, Al Pastor, Billy Allen, Dudson Woods, Daniel Lee Deatherage, Kelly Fred Kalinowski, Irving Schwartz, Ramon Rodriguez, Jr., Robert Lincoln Fowler, Joseph Thomas Marino, and Samuel J. Degiso.

convictions and sentences arising out of their participation in a cocaine importation and distribution conspiracy. After due consideration, we affirm Appellants' convictions and sentences.

I. STATEMENT OF THE CASE

A. *Background Facts*

1. The drug deal

On March 7, 1990, informant Ellis McKenzie informed Customs Agent Lawrence Winberg that appellant Billy Allen and others were involved with narcotics. McKenzie gave Agent Winberg Allen's telephone number. Winberg then contacted Allen, identifying himself as a Colombian drug dealer. As a result of these conversations and ensuing negotiations, Winberg and other undercover agents went to Miami, Florida to meet with Allen and some of his fellow conspirators.

On March 25, 1990, Agent Winberg, Agent James Tanner, and McKenzie met with Allen and appellant Dudson Woods at the Sofitel Hotel to discuss their cocaine deal. Agent Tanner testified that he overheard a conversation between Allen and McKenzie in which Allen mentioned a previous cocaine trip to [1537] Honduras and stated how rich they would become at the conclusion of the drug transactions. The next day Allen introduced Agent Tanner and Agent Kyle Barnette to appellant Joseph Marino. Later that day, Winberg, Barnette, and Tanner met with Fabio DeChristofaro and appellants Samuel Degiso, Irving Schwartz, Allen, Woods, and Marino. At this meeting, videotaped by the government, Schwartz told Winberg that he could transport the cocaine using a specially prepared airplane. Agent Sinberg stated that he would supply his own transportation, whereupon Schwartz offered to buy 1,000 kilograms of cocaine for $10,000-$12,000 per kilogram.

They agreed that Schwartz would pay $250,000 "earnest money" in the United States.

At a videotaped meeting on march 27, 1990, attended by Winberg, Tanner, Barnette, McKenzie, Schwartz, Marino, Andy Schell, and Larry Feder, Schwartz stated that he wanted a long-term deal. Following the meeting, surveillance units photographed Marino, Schwartz, Feder, and Schell talking in the parking lot. These units later photographed marino meeting with appellant Dan Deatherage. Winberg subsequently informed Allen and Woods about the meeting and told them that he would go to Honduras to work out the deal in early April.

In early April of 1990, Agents Winberg and Barnette met Schwartz at a Hilton Hotel in Pensacola, Florida to discuss the logistics of the cocaine deal. Schwartz told them that: (1) the cocaine would be sold in the Northeast; (2) he had a good organization; and (3) his people were "prepared to die." Subsequently, it was arranged for Agent Winberg to meet with Schwartz and Marino in Mobile, Alabama to receive the $250,000 earnest money. The parties agreed that Schwartz or Marino would remain with Winberg until payment of the balance on the cocaine.

On April 10, 1990, the Customs Service in New Orleans, Louisiana detained McKenzie as he tried to enter the United States from Honduras. Customs agents stopped McKenzie because he had crack cocaine on his person. Winberg went to New Orleans and met with McKenzie, who was released.

On April 14, 1990, Marino called Winberg to tell him he was at a hotel in Baldwin County, Alabama. Two days later, Winberg and Barnette met with Schwartz at the hotel to receive the earnest money. Feder, Marino, and Deatherage were also present.

On April 17, Agents Winberg, Barnette and Mike Ciaurro met Schwartz to discuss delivering the cocaine in Baldwin County, Alabama. Because Schwartz told the agents that he wanted to see the cocaine, Winberg and Ciaurro accompanied Deatherage to view the cocaine.[2] When shown the cocaine, Deatherage snorted some. The delivery was then set for the next day.

In the morning of April 18, 1990, Marino met with Agents Winberg, Barnette and Ciaurro, telling them that Schwartz and Deatherage had gone to meet the drivers. Barnette then left to prepare the delivery site. Marino also told the agents that (a) he, Schwartz, Schell, and Feder put up the money for the cocaine and (2) that Mannie (appellant Jose Manuel Ruiz) was in charge of the transportation. Marino then offered to stay in Alabama until the balance of the money was paid.

As arranged, Schwartz, Deatherage, and Agents Barnette and Tanner rendezvoused with the drivers. At the rendezvous site, Schwartz told the agents that he would be using two trucks and a Nissan automobile to transport the drugs -- each truck would hold 250 kilograms with the Nissan carrying sixty kilograms in a secret compartment. Schwartz introduced appellants Deatherage and Kelly Kalinowski as "his guys." He then instructed everybody to go to the loading site, a barn in Baldwin County, while he returned to the hotel. At the loading site, Agent Keith Barnette observed appellants Oscar Diaz and Jesus Fernandez working as part of Schwartz's loading and transportation crew. Diaz told Keith Barnette that the cocaine would be hidden in the truck's sleeper compartment. As the

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[2] The cocaine was not actually from Honduras but was instead from the government's supply of previously confiscated cocaine.

cocaine was being [1538] loaded, several agents[3] observed Deatherage and Ruiz counting the bags. Agent Tanner overheard Ruiz telling Deatherage to verify the count because any shortfall would come out of their pockets. Assisting in the unloading were appellants Degiso, Kalinowski, Fernandez, Ramon Rodriguez and Al Pastor. Agents observed Diaz loading the sleeper compartment and overheard a conversation between him and Rodriguez in which each that the other had been counting. Ruiz was then heard telling them that they were partners and had better get it straight. Diaz then began using a calculator.

Meanwhile, appellant Robert Fowler asked one the of the agents if he could cover the floor because he was going to open the Nissan's secret compartment beneath the vehicle and did not want to get dirty. As Fowler got under the Nissan, he told agents that it would hold sixty kilograms. Fowler also told the agents that he did not know how to open the compartment because he had never before used it. Fowler asked for various tools, but Fernandez told him that none were available.

Once the cocaine was loaded, the men were arrested. Schwartz and Marino were arrested at their hotel. Woods and Allen were arrested in Miami, on April 22, 1990. In a post-arrest statement, Woods admitted working for Feder and telling Feder that he could obtain cocaine from McKenzie.

2. Schell's testimony

Andy Schell testified for the government. He identified "Mannie" as appellant Manuel Ruiz and admitted being involved in the drug business with Schwartz, Marino, and Ruiz.

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[3] A number of agents were in the barn, pretending to be part of Winberg's Colombian drug gang.

Schell testified that after meeting Schwartz and Marino, he began buying cocaine from Schwartz, Marino, and Deatherage and that, Feder later became involved. Schell also testified that, at Schwartz's request, he raised $70,000 for the deal with Agent Winberg. Schell identified Deatherage, Woods, and Allen as Schwartz's partners.

B. *Procedural History*

On April 19, 1990, Marino, Schwartz, Deatherage, Degiso, Ruiz, Diaz, Rodriguez, Pastor, Kalinowski, Fowler, and Fernandez were indicted in a five-count indictment charging them with (I) conspiracy to possess with intent to distribute cocaine, (II) attempt to import cocaine, (III) conspiracy to import cocaine, (IV) attempt to possess cocaine with intent to distribute, and (V) possession of cocaine with intent to distribute. A separate but identical indictment was issued against Allen and Woods. The two cases were then consolidated.

The trial began September 19, 1990 and lasted approximately two and one-half weeks. During the trial, the court granted judgment of acquittal motions in favor of Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler on Counts II and III. Following the giving of an *Allen* charge, Marino, Schwartz, Degiso, Allen, Deatherage, Woods and Ruiz were convicted of Counts I, III, and V and found not guilty on Counts II and IV. In addition, Diaz, Fernandez, Pastor, Kalinowski, Rodriguez, and Fowler were convicted on Count V and acquitted on Counts I and IV. Appellants were sentenced to lengthy prison terms.

II. ANALYSIS

Among them, Appellants raise multiple issues concerning alleged errors at trial and sentencing.[4] We address below only those issues having merit, specifically whether: (1) the district court abused its discretion in redistricting cross-examination of Agent Keith Barnette or informant McKenzie; (2) the prosecutor impermissibly inject race into the trial; (3) the prosecutor struck a venire-person based on race; (4) the court erred in admitting post-arrest statement of Fowler; and (5) Appellants' sentences violate either the Ex Post Facto Clause or the Eighth Amendment.[5]

[1539]

A. Limitations on Cross-Examination

1. Agent Barnette

[1] Shortly after Appellants were arrested, Agent Keith Barnette was arrested and charged by Alabama

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[4] We note that not all Appellants join in each claim. Nonetheless for the sake of convenience, we will refer to Appellants when discussing each claim.

[5] Having carefully studied the record, we find that *all* other issues raised by Appellants are without merit. Accordingly, further discussion is not warranted with regard to Appellants' claims concerning (1) various acts of alleged prosecutorial misconduct, (2) suppression motions, (3) the completeness of the trial transcript, (4) double jeopardy, (5) peremptory challenges, (6) the admission of Deatherage's other crimes and certain statements made by Marino, (7) the *Allen* charge, (8) violations of the Jencks Act, (9) the sufficiency of the evidence, and (10) Winberg's cross-examination.

authorities with vehicular homicide committed while on duty.[6] At trial, Appellants sought to question Barnette regarding the arrest and discrepancies between his testimony and his rough notes, prepared one week after the arrest. Appellants proffered that they would impeach Barnette by showing that he had changed his testimony as a result in the hope of receiving leniency in his pending criminal case and/or assistance in any civil actions against him. However, the government filed a motion in limine to prevent defense counsel from examining Barnette concerning the vehicular homicide action. In granting the government's motion, the district court held that so long as Barnette's testimony was consistent with his rough notes, which had previously been turned over to Appellants, Appellants could not question Barnette about the accident or pending action against him.

On direct examination, Barnette testified that Diaz had spoken to him regarding the "count" on the cocaine and had used a calculator to add the cocaine packages. On cross-examination, Barnette admitted that his notes did not reflect the conversation or Diaz's use of a calculator. Appellants then asked Barnette whether there had "been new developments in your life that might cause to you want to curry favor with the United States Government prosecutors and customs agents and other law enforcement agents in this case." Barnette answered in the negative. Asked the same question a second time by the court, Barnette again denied having any reason to "curry favor." Appellants then moved to pursue further this line of questioning, which was denied.

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[6] At the time that Barnette testified, he performed only administrative duties pending the results of an internal affairs investigation. A civil action was also instituted against him.

Appellants next asked whether Barnette was under investigation by the Internal Affairs of the Customs Service and no longer on active duty. The court sustained the government's objections before Barnette answered either question. However, Barnette did answer "yes" in response to Appellants' question if he would lose his job if he committed perjury. On redirect, Barnette testified that the day after Appellants' arrest and prior to creating his notes, he told the U.S. Attorney's Office about the conversation with Diaz and about Diaz's use of a calculator. After the government concluded its case-in-chief, defense counsel recalled the witness and attempted to establish its proffer. As before, Barnette denied being biased or motivated on behalf of the government. Consequently, the court maintained its prior ruling prohibiting examination into the vehicular homicide action. On appeal, Appellants claim that restricting Barnette's cross-examination was error. We disagree.

[2-4] Although the district court possesses discretionary power to rule on the admissibility of evidence, *United States v. Garcia*, 13 F.3d 1464, 1468 (11th Cir.), *cert. denied*, ___, 114 S.Ct. 2723, 129 L.Ed.2d 847 (1994), its discretion in limiting the scope of cross-examination is subject to the requirements of the Sixth Amendment. *Id.; United States v. Lankford*, 955 F.2d 1545, 1548 (11th Cir.1992).[7] The right to cross-examine is not unlimited, however, because once there is sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the district court's discretion. *United States v. Taylor*, 17 F.3d 333, 340-41 (11th Cir.1994). "The test for the Confrontation Clause is whether a reasonable jury would have received a signifi-[**1540**]cantly different impression of the

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[7] The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const., sixth amend.

witness' credibility had counsel pursued the proposed line of cross-examination." *Id.* (quoting Garcia, 13 F.3d at 1469).

[5] Appellants wished to question Barnette about the state court indictment, hypothesizing that it gave him motive to testify favorable for the government in the hopes that he would receive leniency or assistance as to the homicide action. Appellants rely on *Greene v. Wainwright*, 634 F.2d 272, 275-76 (5th Cir. 1981) for the proposition that because they were attempting to show bias on the part of a prosecution witness, Barnette, the limitation on cross-examination was unconstitutional. Nonetheless, the mere fact that Appellants sought to explore bias on the part of a prosecution witness does not automatically void the court's ability to limit cross-examination. It is axiomatic that the right to cross-examination is not absolute because "the information sought to be elicited must be relevant." *Haber v. Wainwright,* 756 F.2d, 1520, 1522 (11th Cir.1985).

Here, Barnette's testimony was consistent with statements given prior to both the creation of his notes and his arrest. Barnette's testimony simply parroted statements made at a time when he had no special incentive to seek the government's help. Because of the highly prejudicial nature of the arrest, the court properly handled the cross-examination by limiting inquiry into the accident as long as Barnette's testimony did not deviate from his notes and prior statements. The fact that his testimony was entirely consistent with these prior statements demonstrates that Barnette was not shading his testimony in an effort to gain leniency on his state court case. Moreover, we note that there is no evidence in the record showing that the government had the ability to grant leniency

in Barnette's Alabama action.[8] In light of these circumstances, we fail to see how the limitation on cross-examination constituted an abuse of discretion or violated the Sixth Amendment. *See United States v. Thorn*, 917 F.2d 170, 176 (5th Cir.1990) (barring defendant from exploring government witness' state law indictment did not violate Sixth Amendment as there was no evidence the government could influence the state court proceedings, and the existence of a pending state court indictment on charges totally unrelated to the testimony offered in the case did not give the witness a substantial reason to cooperate with the government). Finally, Appellants were able to delve into Barnette's credibility, albeit in a limited fashion, by inquiring if he had any reason to "curry favor" with the government. Thus, the district court did not abuse its discretion by limiting Appellants' cross-examination of Barnette.

2. Informant Ellis McKenzie

At trial, the government declined to call McKenzie as a witness. Instead, Appellants introduced McKenzie's testimony via a pretrial deposition. Appellants planned to use the deposition to show that Winberg lied in stating that he had not intervened and assisted McKenzie when McKenzie was detained for possession of crack cocaine in New Orleans. Additionally, Appellants sought to demonstrate that McKenzie might be biased in favor of the government to prevent criminal charges being brought concerning the New Orleans crack

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[8] Appellants reliance on *Lankford* is misplaced inasmuch as *Lankford* involved a witness possible motive to cooperate with the government in order to (1) "protect his sons," (2) "obtain federal assistance in avoiding a subsequent federal prosecution against them," (3) "solicit help [from the] federal government in his sons' state case." 955 F.2d at 1549. The facts in this case are substantially different.

incident. The district court refused to allow Appellants to introduce the entire deposition, allowing only those portions that it deemed relevant for impeachment purposes. Thus, Appellants were prohibited from introducing McKenzie's testimony about his detention in New Orleans. However, the court did permit Appellants to introduce portions of the transcript in which McKenzie admitted being a paid government informant. Appellants claim that the court's limitation violated their Sixth Amendment confrontation rights and constituted reversible error. We disagree.

[6] The court did not err by refusing to allow Appellants to enter either those portions of McKenzie's deposition involving the [**1541**] New Orleans incident or the deposition *in toto*. *See United States v. Thompson*, 976 F.2d 666, 671 (11th Cir.1992) (introduction of complete medical records unwarranted where they were not as a whole probative of witness' credibility; only those portions inconsistent with witness' trial testimony were probative of and could be used for impeachment), *cert. denied*, ___ U.S. ___, 113 S.Ct. 3010, 125 L.Ed.2d 701 (1993). Furthermore, a review of the record demonstrates no significant inconsistencies between Winberg's and McKenzie's descriptions of the New Orleans crack incident. Accordingly, the district court did not err in limiting the impeachment uses of McKenzie's deposition.

[7,8] We find that Appellants' Sixth Amendment claims similarly lack substance. Although Appellants wanted to probe deeply into McKenzie's background, the Sixth Amendment is satisfied where sufficient information is elicited to allow the jury to gauge adequately a witness' credibility and to assess his motives or possible bias. *United States v. Burke*, 738 F.2d 1225, 1227-28 (11th Cir. 1984) (sufficient information elicited where jury knows a witness has been granted immunity, participated in the witness protection program, and received money from the government). For example, in *United States v. Kopituk*, we held

that a court does not abuse its discretion by limiting cross-examination of the government's "most vital" witness where the jury knows that the witness has an agreement with the government to testify in exchange for a lenient plea arrangement on pending charges. 690 F.2d 1289, 1337 (11th Cir.1982), *cert. denied*, 461 U.S. 928, 103 S.Ct. 2089, 2090, 77 L.Ed.2d 300 (1983).

Here, Analogous information was presented to the jury. McKenzie, who can in no way be termed a "vital witness," admitted that he was a government informant, that he had been paid money in the past, and that he had received $12,000 in this case. He also testified that he had received $2,000 the day before his deposition and that he spent time preparing for his deposition int eh company of Agents Kyle Barnette and Dwight McDaniel. The jury also knew that McKenzie stood to receive $250,000, representing the maximum award allowed to informants. Finally, the jury was aware that whether McKenzie actually received the $250,000 would be determined by Winberg's superiors. Under these circumstances, no further bias would have been exposed by investigation into McKenzie's character or the events surrounding his New Orleans detention. *United States v. Alonso*, 740 F.2d 862, 874 (11th Cir.1984) (court properly prohibited inquiry into facts concerning witness' arrest; defendants were allowed to ask if witness made a deal with government or expected a benefit for testifying), *cert. denied*, 469 U.S. 1166, 105 S.Ct. 928, 83 (L.Ed.2d 939 (1985).[9]

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[9] Given the overwhelming evidence presented against each appellant, even if we were to conclude that McKenzie's cross-examination had erroneously been limited, the error would have been harmless. *See Grizzell v. Wainwright,* 692 F.2d 722, 726 (11th Cir.1982) (no "reasonable probability" that verdict was affected by the error), *cert. denied*, 461 U.S. 948, 103 S.Ct. 2129, 77 L.Ed.2d 1307 (1983).

B. Racial Comments

[9] Appellants claim that the prosecutor impermissibly injected race into the case during the redirect of Schell wherein the following exchange occurred:

> PROSECUTOR: You responded to some questions related to pressure from Mr. Schwartz and Mr. Marino about money that was owed, do you recall those questions?
>
> SCHELL: Yes.
>
> PROSECUTOR: What type of pressure, if any, was applied to you for collection for money?
>
> SCHELL: Mr. Marino, not Mr. Schwartz. He had told me that I couldn't control Struder and that the only way to control him was to take a bat to him. He used other words but that was the jist [sic] of it.
>
> DEFENSE COUNSEL: I object to the conclusion of remarks as to what he considers the jist [sic] of something said to him and ask that last statement be strick-[**1542**]en.
>
> THE COURT: I am not sure I understand your last answer, without giving any undue...
>
> SCHELL: Okay. Struder -- he told me that he wanted to go to Struder's house and that *the only way to control a nigger was to beat him with a bat.*
>
> THE COURT: Overrule your objection.

PROSECUTOR: Were those Mr. Marino's exact words?

SCHELL: Yes.

PROSECUTOR: *Is Mr. Struder a black man?*

DEFENSE COUNSEL: Judge, I object. That is absolutely immaterial and irrelevant in regard to this.

THE COURT: Overruled.

(emphasis supplied).

Schell did not answer the prosecutor's question as the prosecutor immediately movéd onto other points. At a bench conference following this examination, Appellants moved for a mistrial, alleging that the government was attempting to inflame the black jurors against the white Appellants. The district court denied the motion. Appellants declined the court's offer to give a curative instruction.

While this Court is ever-vigilant regarding the improper injection of race into criminal trials, the prosecutor's statements do not constitute an improper appeal to race. Thus, we do not believe that a mistrial was warranted. *See Willis v. Kemp,* 838 F.2d 1510, 1522-23 (11th Cir.1988) (although improper, prosecutor's question of black defendant as to whether he referred to his white victim as a "honkey" was not grounds for granting a mistrial), *cert. denied*, 489 U.S. 1059, 109 S.Ct. 1328, 103 L.Ed.2d 596 (1989); *United States v. Krohn*, 573 F.2d 1382, 1389 (10th Cir.) (government's eliciting from a witness that one of two white defendants on trial for mail fraud had referred to a victim of their scheme as a "poor black bastard" was not an appeal to racial prejudice), *cert. denied,* 436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978). *See also United States v.*

Hernandez, 865 F.2d 925, 927-28 (7th Cir.1989) (prosecutor's improper closing remark to "send clear message to Cuban drug dealers" was not so inflammatory as to prejudice Cuban defendant).

C. Strike of Venireperson

At trial, the prosecutor exercised peremptory strikes to remove three black persons from the jury. Appellants assert that one of these challenges, that of Venireperson Portis, violated the Constitution's equal protection guarantee because it was racially motivated. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Without finding that Appellants had established a prima facie case of discrimination, the district court asked the prosecutor to articulate the reasons underpinning the strikes. The prosecutor responded that she struck Portis because (1) she believed that Portis may have been related to a defendant whom she had formerly prosecuted and (2) Portis was generally in attentive during the voir dire, focusing on the defense table during jury selection. The court upheld the strike of Portis.

[10-12] We give great deference to a district court's finding that the government rebutted a prima facie case of discriminatory jury selection and reverse only if that finding is clearly erroneous. *United States v. Cure*, 996 F.2d 1136, 1138 (11th Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1075, 127 L.Ed.2d 393 (1994). Given that the court asked the prosecutor to explain her strikes of black venirepersons, we shall assume that Appellants met the requirements of a prima facie case and therefore proceed directly to determining whether the prosecutor's reasons for striking Portis were race-neutral. The prosecutor's belief that the venireperson may have been related to a defendant in an earlier case did not justify the challenge. The record suggests that the venireperson was unrelated to that defendant as Portis did not affirmatively respond to the court's

inquiry to the venire whether any family member had every been involved in a criminal matter in court. Nonetheless, a venireperson's inability to pay attention is a proper race-neutral reason for using a peremptory strike. *See United States v. Hendrieth*, 922 F.2d 748, 749-50 (11th Cir.1991) (per curiam) upholding trial court's decision to allow a strike based upon a juror's inatten-[**1543**]tiveness and her rolling and rubbing her eyes during voir dire).

[13] Explanations based upon a juror's demeanor are, however, difficult to confirm on appeal because the transcripts that comprise the record before the Court do not portray the unacceptable behavior. Moreover, such explanations are particularly susceptible to the kind of abuse prohibited by *Batson*. Consequently, to allow meaningful appellate review, trial judges should fully develop the record regarding the specific behavior by a venireperson that leads to a peremptory strike and should verify that the stricken venireperson's conduct was conspicuously different from that of the other venirepersons. *See United States v. Cooper,* 19 F.3d 1154, 1161 (7th Cir.1994) (upholding demeanor-based strikes in part because trial judge noted on record that, based on his own observations, the prosecutor's interpretations were reasonable); Michael J. Raphael & Edward J. Ungvarsky, *Excuses, Excuses: Neutral Explanations Under Batson v. Kentucky*, 27 U.Mich.J.L.Ref. 229, 246-50, 266-67 (1993) (arguing that courts should reject demeanor-based explanations that cannot be confirmed by the record).

[14] In this case, Appellants do not dispute that Portis directed her attention toward the defendants, away from the prosecution, during jury selection, allowing us to infer that Portis' behavior was different from the other venirepersons. *Cf.Cure,* 996 F.2d at 1138-39 (defense counsel's failure to offer contrary description of venireperson's demeanor militates against reversal). Accordingly, the district court did not clearly

err by finding that the prosecutor offered a race-neutral reason for striking Portis from the jury.

D. Robert Fowler's Post-Arrest Statement

Following the receipt of his *Miranda* rights at the bar, Fowler was asked if he wanted to waive his rights. He responded by shaking his head. He was then take to jail. Some four hours after his arrival, agents brought him to an interview room where Agent McDaniel told Fowler the charges against him and that he would be tried in Alabama. Agent McDaniel then asked other agents present in the interview room if Fowler had been "Mirandized." The agents responded that he had been. Thinking that Fowler might not understand the term "Mirandized," McDaniel notified Fowler that he had a right to an attorney and a right not to speak to the agents. Fowler acknowledged that he was aware of his *Miranda* rights. McDaniel then asked him if he wished to cooperate. At trial, McDaniel testified that Fowler responded by saying that he could not cooperate, he did not know anything or anybody, he was paid to be "blank," and he was simply a chauffeur driving someone from Miami. McDaniel further testified that when he question Fowler about $500 that Fowler possessed when arrested, Fowler stated the had would rather not say who paid him and that he was sorry he had gotten greedy. Fowler then asked for an attorney and questioning ceased. The court denied Fowler's motion to suppress these statements.

[15] On appeal, Fowler contends that the denial of his suppression motion was error because he had unequivocally invoked his *Miranda* rights. Assuming, without deciding, that Fowler is correct, the taking of his statements in contravention of *Miranda* is subject to the harmless error analysis. *United States v. Beale,* 921 F.2d, 1412, 1435 (11th Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 100, 116 L.Ed.2d 71 (1991): *United States v. Pena,* 897 F.2d 1075, 1082 (11th Cir.1990). Our inquiry is

two-fold. First, we examine the effect the erroneously admitted statement had upon other evidence introduced at trial and upon the conduct of the defense. *Beale,* 921 F.2d at 1435. Second, if, absent the illegal statement, the remaining evidence is so overwhelming to establish guilt beyond a reasonable doubt, admission of the statement is harmless. *Id.*

[16] At trial, Agent Tanner testified that Schwartz told him that a Nissan automobile with a secret compartment in its underbelly capable of storing sixty kilograms of cocaine would be one of the vehicles used to load and transport the drugs. The government introduced photographs showing the Nissan's se-[**1544**]cret compartment at trial. It is uncontroverted that Fowler was present at the barn and that he spent much time there under the Nissan. Agents Lamplaugh, Tanner, and Keith Barnette testified that at the barn Fowler expressly told them that he was attempting to open the Nissan's hidden compartment. Agents Lamplaugh and Tanner also testified that they overheard Fowler telling other appellants that he needed tools and a flashlight to open the compartment. Additionally, Agent Lamplaugh testified that Fowler told him that the compartment held sixty kilograms of cocaine. Given the overwhelming strength of this evidence, we conclude that the admission of Fowler's post-arrest statements was harmless error.

E. Sentencing Issues

1. Ex Post Fact Violation

[17] To avoid ex post facto problems, we have held that a defendant is to be sentenced under the Guidelines and commentary in effect on the date of sentencing unless a more lenient punishment would occur under the Guidelines' version in effect on the date the offense was committed. *United States v. Wilson*, 993 F.2d 214, 216 (11th Cir.1993). furthermore, Guideline commentary is authoritative unless its interpretation

violates the law or is an erroneous reading of the Guidelines. *Stinson v. United States,* ___ U.S. ___, ___, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

[18] Ruiz claims that an ex post facto violation occurred when the district court refused to give him an acceptance of responsibility reduction based on commentary that took effect *after* he was convicted but *before* he was sentenced. Although "application of an intervening Guideline interpretation by commentary promulgated after the offense could run afoul of the Ex Post Fact Clause," *United States v. Carroll,* 6 F.3d 735, 746 n. 9 (11th Cir. 1993), *cert. denied,* ___ U.S. ___, 114 S.Ct. 1234, 127 L.Ed.2d 577 (1994), we are not confronted with such a situation. Where, as here, the amendments do not overrule prior construction but instead serve to confirm our reading of the Guidelines section; ex post facto concerns are not implicated. *Id.*

[19] Prior to Ruiz's sentencing, the Guidelines stated:

> Conviction by trial does not preclude a defendant from consideration [for receiving an acceptance of responsibility reduction.] A defendant may manifest sincere contrition even if he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt. (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct).

U.S.S.G. § 3E1.1 comment. (n. 2) (Nov. 1989). The revised commentary that the court applied at sentencing provides that the acceptance of responsibility reduction

> is not intended to apply to a defendant who puts the government to the burden of proof at trial by denying

> the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.* to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

U.S.S.G. § 3E1.1 comment. (n. 2) (Nov. 1990). The district court's application of the sentencing Guidelines is subject to *de novo* review. *United States v. Rodriguez* 959 F.2d 193, 195 (11th Cir.), *cert. denied,* ___ U.S. ___, 113 S.Ct. 649, 121 L.Ed.2d 563 (1992).

[20] We have previously held that entry of a not guilty plea and insistence upon a trial are factors that may be considered in [**1545**] determining whether a defendant has accepted responsibility for his crime. *United States v. Castillo-Valencia,* 917 F.2d 494, 501 (11th Cir.1990) (holding that decision to go to trial may not be used to bar categorically an acceptance of responsibility reduction), *cert. denied*, 499 US. 925, 111 S.Ct. 1321, 113 L.Ed.2d 253 (1991). Moreover, we have also recognized that a defendant who exercises his right to trial may diminish his change of being granted the acceptance of responsibility reduction as there is less evidence of acceptance to weigh in his favor. *Rodriguez*, 959 F.2d at 197. Thus, the revised commentary relied on by the district court does not overrule §3E1.1 but instead accords with our reading

of the section. In such cases, the Ex Post Facto is not implicated. Thus, this claim fails. *Cf. Carroll,* 6 F.3d at 746 n. 9 (no ex post facto concerns where Guideline amendment regarding definition of a drug does not overrule prior constructions of the Guideline but instead confirms our reading of the Guideline).

2. Eighth Amendment

[21] Schwartz claims that his life sentence violates the Eighth Amendment. According to Schwartz, the district court erred by mechanically applying the Guidelines and failing to appreciate that Schwartz did not possess the intent or the ability to purchase the cocaine, and the he could not have distributed it in any event as it was government owned and controlled. Schwartz thus asserts that his sentence is so unjust and harsh as to violate the Eighth Amendment. We reject Schwartz's claim. A review of the record indicates that the court sentenced each Appellant individually. Moreover, even assuming that the court failed to make individualized findings, the sentence may nonetheless be upheld where, as here, the record supports the amount of drugs attributed to the defendant. *United States v. Ismond*, 993 F.2d 1498, 1499 (11th Cir. 1993). Because the amount of drugs attributed to Schwartz was proper, his life sentence is neither cruel nor unusual. *See United States v. Willis,* 956 F.2d 248, 251 (11th Cir. 1992) Guidelines do not violate Eighth Amendment).

III. CONCLUSION

Appellants' sentences and convictions are AFFIRMED.